U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 January 2003

Case No. 2002-LHC-0840
OWCP No. 10-39394

In the Matter of
JAMES HENNING,
Claimant,

v.

JAMES MARINE,
Employer,
and
AIG INSURANCE COMPANY,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:
Steven Schletker, Esq.
Schletker, Hornbeck & Moore
Covington, Kentucky
For the Claimant

Carl Marshall, Esq.
Marshall and Miller
Paducah, Kentucky
For the Employer

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

DECISION AND ORDER - AWARD OF BENEFITS

This case arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq.* ("LHWCA" or "the Act"). Unless otherwise noted, all citations refer to the LHWCA.

On January 9, 2002, this case was referred to the Office of Administrative Law Judges by the Office of Workers' Compensation Programs for a hearing. Following proper notice to all parties, a formal hearing in this matter was held before the undersigned on April 25, 2002, in Cincinnati, Ohio. All parties were afforded full opportunity to present evidence as provided in the Act and the Regulations issued thereunder and to submit post-hearing briefs.

The findings of fact and conclusions of law set forth in this Decision and Order are based on my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not mentioned specifically, has been carefully reviewed and thoughtfully considered. References to ALJX. 1-7, EX O-KK, and CX A-T pertain to the exhibits admitted into the record and offered by the Administrative Law Judge, the Employer, and the Claimant, respectively. The Transcript of the hearing is cited as Tr. followed by page number. Employer's exhibits A through N are excluded. (Tr. 17).

STIPULATIONS

At the hearing, the parties submitted the following stipulations (Joint Exhibit 1).

1. The parties are subject to the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §901 *et seq.*).

2. The Claimant and the Employer were in an employee-employer relationship at the time of the accident/injury;

3. The accident/injury occurred on October 1, 2001;

4. Employer was advised or learned of the accident/injury on October 1, 2001;

5. Employer was timely notified of the injury;

6. Claimant filed a claim for compensation (form LS-203) with the United States Department of Labor on October 26, 2001;

7. Claimant filed a timely notice of claim;

8. Employer filed a notice of controversion on October 9, 2001;

9. Claimant has received no compensation to date.

10. Claimant's "usual employment" was that of a welder on James Marine dry dock #5;

11. Claimant has not returned to his usual employment with the Employer since the date of injury;

12. Claimant's hourly rate at the time of the accident/injury was $10.00;

13. For a one-year period immediately prior to the accident/injury, the Claimant was a five day-per week worker;

14. Claimant has not yet reached maximum medical improvement;

ISSUES

The Issues in this case are:

1. Whether Claimant's injury arose out of and in the scope of employment;

2. Whether Claimant has demonstrated a causal relationship between his alleged disability and his work accident, which would entitle him to invoke the presumption of causation contained in Section 20(a);

3. Whether Claimant is entitled to Temporary Total Disability from October 1, 2001, to date and continuing;

4. Whether Claimant is entitled to the payment of medical benefits under Section 7, including authorization for Dr. Jackson to perform a complete arthroplasty on the right hip;

5. Whether Claimant is entitled to the payment of medical bills in the amount of $2015.83;

6. Whether Claimant is entitled to attorney fees and litigation expenses; and

7. Whether, at the appropriate time, Claimant is entitled to § 8(f) relief.

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

James Henning ("Claimant") was born on September 22, 1949. (Tr. 32). He is married, and he and his wife provide a home for their granddaughter. (Tr. 33). Mr. Henning has a seventh grade education and served in the United States Army in Vietnam. (Tr. 33). He has held various positions where he performed general labor. (Tr. 34). Mr. Henning was first hired by James Marine ("Employer") on March 12, 1999. (CX K; Tr. 35). He was terminated by Employer on February 24, 2000, due to his incarceration. (CX K; Tr. 43). Mr. Henning was re-hired by Employer as a welder/laborer on March 16, 2001, upon his release from prison. (CX K; Tr. 45). The duties of his employment involved a lot of climbing, lifting and carrying, and crawling. (Tr. 35-40). Mr. Henning testified that he would experience aches and pains almost daily in his ankles, knees, or back, but that he never had any problems with his hips prior to October 1, 2001. (Tr. 56).

Mr. Henning reported for work at 6:00 AM on October 1, 2001. (Tr. 57). He and Paul Shute were assigned to repair fractures in the hopper of a coal barge. (Tr. 57, 59). After gathering their tools, they climbed down a ladder into the hopper. (Tr. 59). There was still some coal remaining in the bottom of the hopper, so Mr. Henning and Mr. Shute used brooms and shovels to sweep the coal from the sides of the hopper into the center so that they could locate the fractures. (Tr. 59). Mr. Henning had been welding for a while and he was running out of his welding lead as he neared the end of the hopper.[1] (Tr. 61). Mr. Henning stopped welding and pulled on his stinger in order to draw more of his lead from the dry dock.[2] The stinger disconnected from the lead as Mr. Henning pulled. He fell backwards onto the hopper, landing on his hip.[3] Mr. Henning tried to catch himself and got coal in the bottom of his hand. Mr. Henning was helped to his feet by Mr. Schute, and then he leaned against the wall of the hopper to catch his breath. (Tr. 62). His hip began to hurt immediately after the fall, but he thought that it was just a bruise and tried to loosen it by taking a few steps. The lunch whistle blew, and Mr. Henning climbed up the ladder and out of the hopper. (Tr. 63). Mr. Henning met his supervisor, Curtis Goode, in the lunchroom and they completed an accident report. (Tr. 63, 64; CX K). The accident report states the nature of injuries sustained as "fell on tail bone", and provides the injured's version of what happened as "pulling on a lead in coal barge slipped and fell backwards,

[1]A welding lead is a copper cable encased in rubber, generally one inch in diameter, which could be attached to the welder affixed to the dry dock to enable welding to be performed inside the hopper. (Tr. 58).

[2]A stinger is a welding torch that attaches to the end of a lead. (Tr. 61).

[3]Mr. Henning testified at the hearing that he was standing on a pile of coal that was at least two feet high. when he fell. (Tr. 61). Counsel for Employer questioned Mr. Henning on cross-examination regarding his deposition testimony that he was standing on a pile of coal three to four feet high. The transcript of Mr. Henning's deposition was not submitted. The testimony Mr. Henning provided at the hearing is his only statement regarding the occurrences on October 1, 2001.

about 11 AM." (CX K). He did not request medical attention and he did not leave work. (Tr. 98). Mr. Henning ate lunch, then he and Mr. Shute walked back down to the hopper. (Tr. 65). By now, Mr. Henning was limping, but it wasn't pain that he could not stand. Mr. Henning did not want to miss any time off of work and he was almost finished repairing the barge, so he worked the last two-and-a-half hours of his shift.

Mrs. Henning picked Mr. Henning up from work, and she could tell that there was something wrong with him as he walked up the hill to the car because he was a lot slower and limped a lot worse. (Tr. 118). They drove home, Mr. Henning took a pill, and then he bathed. (Tr. 66). He discussed going to the emergency room, but they decided to call the V.A. hospital. (Tr. 66, 119). The V.A. hospital advised Mr. Henning to contact his family doctor, so Mrs. Henning secured an appointment for Mr. Henning with Dr. Wiggins the following morning. (Tr. 66).

Mr. Henning testified that he had never hurt his hip like this before; never had this kind of pain or condition. (Tr. 72). He stated that he is now on cutches, after using a cane, and that he can barely put his socks on by himself. (Tr. 69). Mr. Henning testified that he had complained to Mr. Goode about pain in his ankles, leg, or back, but never about pain in his hip. (Tr. 73). He also testified that he did not report to someone at the Crawford & Lundberg Clinic that he had hip pain prior to October 1, 2001. (Tr. 73). Mr. Henning stated that he was not limping for any reason on October 1, 2001, but he admitted that there were periods of time when he limped at work. (Tr. 75). He testified that he called the V.A. Clinic on September 27, 2001, but he discussed the medication he was prescribed for stress, and he specifically denied discussing Ibuprofen or Lortab on that date. Rather, Mr. Henning testified that the phone message dated September 27, 2001, contains the text of his conversation on October 1, 2001, with the V.A. Clinic. (Tr. 78, 79). More specifically, he stated that he took two Ibuprofen tablets after his fall at lunch time, which didn't help, and then he took a Lortab after he got home. (Tr. 79).

Lay Testimony

Virgill Malott was deposed on March 28, 2002. (CX O). Mr. Malott worked for Employer as a tankerman, and he worked on dock #5 with Claimant. He described the work that he and Claimant performed as pretty physical. Mr. Malott could not recall an instance where Claimant's physical condition prevented him from performing any job related task. He testified that it is common for he and his coworkers to have muscle strains occasionally. Mr. Malott witnessed Claimant carrying a 65-80 pound chain block on his shoulder, using sledgehammers, and lifting equipment prior to his fall. Claimant told Mr. Malott on October 1, 2001, that he fell in the barge and hurt himself.

Curtis Goode was deposed on March 28, 2002. (CX P). He is Employer's foreman for dock #5. He testified that Claimant was able to perform all of his tasks of his pretty physical job prior to his fall. Mr. Goode saw Claimant on every working day from March 2001 until Claimant's fall. Mr. Goode consistently evaluated Claimant's work as good. He never

referenced any physical problems or limitations in Claimant's evaluations. On October 1, 2001, Claimant reported to Mr. Goode that he was pulling on a lead when his stinger came loose and he fell on his tailbone. Mr. Goode testified that Claimant appeared to be limping when he reported the fall. Mr. Goode was not concerned with Claimant's ability to continue to perform his job on October 1, 2001, after Claimant reported his fall. He testified that Claimant continued to work for three hours after his fall. Mr. Goode testified, at the hearing, that he noticed Claimant limping at work about the middle or towards the end of September of 2001. (Tr. 125). He was concerned for Claimant's safety and questioned him about the limp. Mr. Goode testified that Claimant told him that Claimant had been taking arthritis medication for his hip and that he didn't know how much longer he was going to be able to work. Mr. Goode testified that Claimant told him that Claimant's hip was causing him to limp. He also testified that Claimant was limping when he reported for work on October 1, 2001. Mr. Goode observed that Claimant did not walk any differently after his fall than he did before his fall.

Fred Shute was deposed on March 29, 2002. (CX N). Mr. Shute worked for Employer as a general laborer during October of 2001. He worked with Claimant for the two weeks prior to Claimant's fall on the 6:00 AM to 2:30 PM shift. Mr. Shute could not recall any instance, prior to Claimant's fall, where Claimant's physical condition prevented from performing any job related task. On October 1, 2001, Mr. Shute and Claimant were welding little patches on the cracks on the bottom of a coal barge. They had to sweep and shovel coal away from the areas of the barge they were working on before they could weld. Mr. Shute remembered seeing Claimant using a sledgehammer, while he was standing on a ladder, to fix a bent piece of the coal barge prior to his fall. Mr. Shute testified that Claimant was pulling his lead to the next welding patch, when his feet came out from under him and he fell a leg's length on the bottom of the steel barge. Claimant was standing on the hopper floor when he fell, and not on a pile of coal. Mr. Shute was five to seven feet away from Claimant and saw Claimant fall. He testified that Claimant stood up and it was evident that Claimant was hurting a little bit. It was evident to Mr. Shute was bothered by the fall by the way Claimant walked afterwards. Mr. Shute stated that Claimant was able to complete his work that day, but that he noticed that Claimant was having difficulty working, especially due to his limp. Mr. Shute could definitely tell that Clamant was hurt, and that Claimant was trying his hardest to keep working, but that he wasn't working to the best of his abilities. He stated that Claimant's fall occurred before lunch. Mr. Shute remembers a conversation with Claimant that occurred prior to Claimant's fall, where Claimant referred to his woman being in jail and that he was getting old and expressed some doubt about his continued ability to work. Mr. Shute testified that Claimant climbed up the ladder to leave the coal hopper for lunch, climbed back down the ladder after lunch, continued to weld fractures in the hopper, and then climbed out of the hopper at the end of their shift.

Jeff Curnel was deposed on April 8, 2001. (EX FF). Mr. Curnell works for Employer as a crane operator and fitter. He worked with Claimant from June of 2001 through September 2001. Mr. Curnel testified that Claimant limped a little bit, off and on, on different days. Claimant told Mr. Curnel that he was limping because his back or leg was hurting. Claimant

never mentioned to Mr. Curnel that his hip hurt. Mr. Curnel agreed with the statement that Claimant was able to do all the jobs that were required of him prior to his fall.

Jeanne Ann Elam, a nurse at the V.A. Hospital TEAL Clinic in Marion, Illinois ("V.A. Clinic"), was deposed on April 19, 2002. (CX S). Ms. Elam did not take a phone call from Claimant on September 27, 2001. She attempted to return his call on September 28, 2001, but there was no answer. Ms. Elam remembered a phone conversation with Claimant, but she could not remember anything specific. She testified that she did not make the notation on the front of the note, but that she wrote the message on the back of the note, which reflects contact made with Claimant on October 1, 2001. Ms. Elam signed an affidavit on April 5, 2002. (EX P). She stated that the time of the telephone call was 10:00 AM on October 1, 2001. She stated that the progress note dated October 1, 2001, is a transcription of her handwritten, contemporaneous notes made during her one, and only, conversation with Claimant on October 1, 2001. Phone records obtained by subpoena of all outgoing phone calls from a pay phone on the premises of Employer do not show any phone calls to the V.A. Clinic on October 1, 2001. (CX T). Claimant's phone records document two calls to the V.A. Clinic in Marion, Illinois. (CX R). The first call was placed at 3:35 PM on September 27, 2001, and lasted five minutes. The second phone call was placed at 3:24 PM on October 1, 2001, and lasted five minutes.

Medical Evidence

Claimant presented to the St. Nicholas Family Free Clinic on four occasions in 1999. (EX U; CX A). On his first visit, Claimant complained of flu symptoms and reported a past medical history of arthritis. On January 19, 1999, Claimant brought his current prescriptions in for an evaluation. He was noted to have hypertension with a history of arthritis. Claimant returned the following day to have his blood pressure checked. Claimant was treated for hypertension in March, April, and June of 1999. There were no recorded complaints of pain of any kind. Claimant was treated for hypertension and sinus problems on July 15, 1999, again there were no complaints of pain.

On March 5, 1999, Claimant completed and signed a uniform physical examination report for employment with Employer. (CX B). He marked that he had not suffered a minor or serious injury or disease to any part of his body, including his hip, ankles, and back. Richard Rucker, M.D. performed a physical examination and opined that Claimant was physically and mentally fit for the position of welder. Claimant submitted to an industrial screening by Rehab Associates Physical Therapy, who adminstered a back strength test. Dr. Lundberg interpreted an x-ray of Claimant's lumbar spine. He noted early degenerative disc disease involving L2, L3, and L4, as well as minimal arteriosclerosis of the abdominal aorta. Maritime Consultants, Inc. reported a negative drug screening.

Claimant completed a medical evaluation questionnaire on March 13, 2001. (EX X). Claimant marked that he has had high blood pressure, that he has been x-rayed, and that he has had the measles and mumps. There are several conditions or symptoms which Claimant notably

marked that he never had: coughing, swelling of legs or ankles, stiff joints, back trouble, do you smoke, are you an ex-smoker, muscle pain. Claimant also completed a medical evaluation questionnaire. He indicated that he broke the small finger on his right hand in 1980. He marked that he never had an injury to the rest of the listed body parts, including his back, legs, and hips. Dr. Crawford interpreted an x-ray dated March 14, 2001. He noted that all of the radiographs had scarring. He found minimal early degenerative changes involving the L3 and L4 areas of the spine, but that there was no disqualifying defect. Claimant also underwent a back strength, and was found to meet critical job demands. A drug screening was negative.

Claimant presented to the V.A. Clinic on May 10, 2001. (EX O). He complained of a one year duration of bilateral ankle pain and lower back pain. Claimant reported that recent x-rays revealed a degenerative disc disease of the lumbar spine. He was instructed to bring his medications with him for assessment on his next visit. Claimant was noted to have a history of smoking and alcohol use. He returned to the V.A. Clinic on August 21, 2001, complaining of chronic cough, depression, and anxiety. Dr. Fernandez noted that Claimant has chronic arthritis, primarily involving his ankle and back. He diagnosed reactive depression/anxiety, allergic rhinitis, hypertension, and degenerative joint disease. Dr. Fernandez prescribed medication to treat Claimant's hypertension and depression. Claimant underwent a chest x-ray to determine the etiology of his chronic cough. Dr. Crawford interpreted the x-ray to reveal an essentially normal chest.

The progress notes from the V.A. Clinic contain a telephone note dated October 1, 2001, which was signed by Jeanne Elam, TEAL Clinic Nurse, on October 19, 2001. The note gives the time of the phone call as 10:00. Claimant reported to Nurse Elam that Motrin was not helping his arthritic pain, but that his wife's prescription Lortab did. He also stated that he fell backwards off of a coal barge. Nurse Elam recommended that Claimant come in for an evaluation. Nurse Elam provided an affidavit, wherein she stated that the time of their phone conversation was 10:00 AM on October 1, 2001. (EX P). Nurse Elam stated that her progress note was the transcription of handwritten notes made contemporaneously to her phone conversation with Claimant. The actual message pad, upon which Nurse Elam's notes were recorded, shows that Claimant called the Clinic on September 27, 2001, at 3:35. (EX P). The message recorded was "?Trazadone helping?? Ibuprofen isn't helping with arthritis. Lortab help (his wife has some)." On the back of the phone message note there is written, "9/28 @ 8:30 no answer." There is a space and then there is also written, "Ibuprofen not helping much, fall backwards off of coal barge (rec'd to come to __ eval, will call back)."

Claimant presented to Joseph Higgins, M.D. on October 2, 2001, complaining of pain in his posterior right hip that extends down into his upper leg . (EX Q). Claimant described his pain as sharp at times, dull at other times. Dr. Higgins found no obvious swelling or ecchymosis, but the right upper lateral buttocks area was tender to palpation. Dr. Higgins diagnosed probable contusion to right buttock and hypertension. He referred Claimant to Gershom Lundberg, M.D. for an x-ray of Claimant's right hip and right upper leg. Dr. Lundberg interpreted multiple views of Claimant's lumbar spine, pelvis, hips, and right thigh on October 2, 2001. (EX R). Dr.

Lundberg found mild degenerative changes in the lumbar spine including early disc disease at L4-5. He also found heterogenous increased density in the right hip, which led him to be concerned for avascular necrosis ("AVN"). He found the right thigh views to be negative, and recommended an MRI of Claimant's hip for further evaluation.

Dr. Lundberg performed an MRI study on October 5, 2001. (EX S). Claimant reported right hip and thigh pain. Dr. Lundberg noted that Claimant described a fall earlier in the week, but that Claimant also had some hip pain before the fall. The MRI study revealed extensive signal abnormality in the right femoral head and neck, which appears consistent with AVN. Dr. Lundberg characterized the AVN as Ficat Stage II, or Mitchell Classification C. The degree of femoral head involvement caused Dr. Lundberg to be concerned with the possibility of impending articular collapses.

Claimant presented to Stephen Jackson, M.D. for an evaluation of his right hip on October 11, 2001. (EX T). Dr. Jackson reported that Claimant recently experienced an acute onset of discomfort about his right hip. Upon physical examination, Dr. Jackson detected right hip and groin discomfort as Claimant had described. Dr. Jackson also detected pain at the full extent of internal and external rotation on the right. Dr. Jackson found plain x-rays to be unremarkable, except for some patchy areas of radiodensity about the right femoral head. He noted that the MRI study indicated AVN of the right hip. Dr. Jackson diagnosed AVN of the right hip without collapse at this time. He recommended observation, but opined that Claimant may ultimately require surgical intervention if there is a progression of his disease. Dr. Jackson is a board-certified orthopaedic surgeon.

Dr. Wiggins' office notes indicate that Claimant made an appointment with a Dr. Wilkerson for a second opinion. (CX E). On October 23, 2001, Claimant returned to Dr. Wiggins. Dr. Wiggins noted that Claimant indicated that he had not had any real problems with his hip until after he fell in a coal barge. There was no evidence of swelling or ecchymosis around Claimant's right hip. Claimant used a cane for ambulation. Dr. Wiggins diagnosed hypertension and AVN of the right hip.

Claimant presented to Dr. Jackson on November 8, 2001. (CX H). Dr. Jackson noted that Claimant has severe pain in his right hip from AVN. He opined that an x-ray taken that day revealed no definite collapse of the femoral head, but that the MRI reveals total head involvement from the avascular process. He stated that he was going to proceed with a right total hip replacement. On a separate document, Dr. Jackson listed Claimant's diagnosis as AVN of the right hip. He recommended that Claimant undergo a total hip arthroplasty. He opined that Claimant's injury on October 1 aggravated a pre-existing condition, and that Claimant will be unable to work until after he has surgery.

Dr. Jackson issued a brief narrative response to three questions on November 30, 2001. (EX T). He listed Claimant's diagnosis as AVN of the right hip resulting in considerable pain. Dr. Jackson opined that Claimant will ultimately require a right total hip replacement. He

concluded that he did not believe that the injury caused AVN. Dr. Jackson added that the AVN may have aggravated Claimant's condition and had some bearing on his current level of discomfort.

Cliff Gill, McCracken County Jailer, issued a letter on December 18, 2001. (CX D). He stated Claimant's only medical records are his medication sheets, which documented his prescription for hypertension.

Dr. Jackson examined Claimant on December 21, 2001, and interpreted an x-ray taken that day. (CX H). He noted that the x-ray shows that Claimant is on the verge of a subchondral fracture. He noted that he was awaiting approval of a total hip replacement by Claimant's insurance company. Claimant returned to Dr. Jackson on February 15, 2002. He reported that Claimant continues to complain about right hip pain secondary to AVN. Dr. Jackson opined that repeat x-rays reveal no major collapse of the right femoral head, but that it is forth coming.

Claimant returned to the Heartland-East V.A. Clinic on February 26, 2002. (CX C). He complained of numerous stressors, and stated that he had vascular necrosis and that he was going to undergo a total hip replacement. Dr. Fernandez diagnosed hypertension not well controlled, anxiety, insomnia, and AVN by Dr. Jackson's report.

Dr. Jackson was deposed on March 28, 2002. (CX M). He testified, according to his notes, that Claimant had an acute onset of discomfort about his right hip on October 1, 2001. Dr. Jackson defined AVN as condition where the blood supply to the bone becomes absent, which leads to bone collapsing in a lot of cases. Dr. Jackson testified that his decision to recommend total hip replacement, as opposed to some other conservative measure, was based on a thought process that Claimant either had to put up with the pain and limping around, or have his hip replaced. He indicated that hip replacement could be postponed, but that Claimant would have a real negative quality of life and that he would be at risk for developing a drug problem because he would require narcotics for the pain. He stated that there is a 0% chance that Claimant's hip would improve if surgery is not performed. Dr. Jackson opined that without surgery, Claimant will not be able to return to the workforce and will probably only get worse. He testified that his hip will collapse, as evidenced by the appearance of a fracture line developing on the plain x-ray taken December 21, 2001. Dr. Jackson testified that he has treated hundreds of cases of AVN, less than ten of which were associated with an acute traumatic dislocation. Dr. Jackson does not believe that Claimant's AVN was caused by trauma; it was a condition that existed before October 1, 2001. He then testified that Claimant's AVN was caused by trauma as of October 1, 2001. He stated that his opinion, that Claimant's injury aggravated his AVN, was based on the thought process that a person with AVN can be asymptomatic, then suffer an injury or a jolt that causes a microscopic fracture in a weak bone. Dr. Jackson stated that, if the person was stoic, that an asymptomatic person who suffered a fall that caused the AVN to become symptomatic could go back to work immediately after the fall. Dr. Jackson stated that it was possible for someone with AVN that was aggravated by a fall to climb a ladder after the fall, while another person might have to be taken out with a stretcher.

Dr. Jackson, at his deposition, testified that his diagnosis that the fall aggravated Claimant's AVN was based on Claimant's report that he first experienced pain in that hip after the fall. Dr. Jackson stated that there is no way to tell whether the fall actually aggravated Claimant's condition other than relying on Claimant's history of pain. Dr. Jackson found it likely that an MRI taken on September 30, 2001, would be very similar to the MRI taken on October 5, 2001. Dr. Jackson warned that an MRI is not a pain indicator; that an MRI can look bad, but the person could be asymptomatic. Dr. Jackson testified that he was not surprised that Dr. Wiggins did not observe swelling or bruising on Claimant's hip after the fall. He stated that Dr. Wiggins failed to rotate Claimant's hip, which Dr. Jackson stated would have caused Claimant pain. Dr. Wiggins' testified that, even if Claimant had prior episodes of hip pain, that the pain he suffered after the fall was still an aggravation because it made his condition worse. Dr. Jackson concluded that it is possible that Claimant's hip would have collapsed even if he did not fall on October 1, 2001.

Michael Mont, M.D. submitted a consultative report on April 10, 2002. (EX Y). Dr. Mont reviewed Claimant's medical records, including Dr. Jackson's report, MRIs, and x-rays. He also reviewed a statement from Curtis Goode. Dr. Mont diagnosed right hip AVN, which he determined appears to have already collapsed based on reports that were provided to him. He classified the AVN as Stage III Ficat disease, with a very large head involvement in terms of size. Dr. Mont opined that Claimant's hip condition absolutely pre-existed his accident on October 1, 2001, by six months to three years. He opined that the cause of the AVN was multi-factorial; that it was a combination of risk factors including alcohol and tobacco use, other possible medications, and some possible genetic predisposition. Dr. Mont also opined that it is unlikely that the fall on the deck of the barge aggravated or accelerated Claimant's hip condition. Dr. Mont would recommend that Claimant undergo a bone grafting procedure or a limited resurfacing arthroplasty, but also stated that it would not be wrong to consider a hip replacement. Dr. Mont stated that Claimant would have required the same treatment, even if he had not fallen on October 1, 2001. Dr. Mont is a board-certified orthopaedic surgeon.

Dr. Mont was deposed on April 16, 2002. (EX JJ). Dr. Mont estimated that he performs between 100-200 procedures per year involving AVN. He is a founding board member of the National Osteonecrosis Foundation, as well as a board member of the Center for Osteonecrosis Research and Education. Dr. Mont reiterated his diagnosis that Claimant suffers from AVN of the hip, based on x-rays and MRIs of Claimant's right hip in addition to medical reports from the practitioners who examined Claimant. Dr. Mont stated that he would amend his report to classify Claimant's AVN as stage two ficat disease, wth the possibility of stage three. He stated that Claimant's hip is dying pretty big time and it will eventually collapse, which will lead to very disabling hip arthritis unless his hip is replaced. He reiterated his opinion that Claimant's AVN existed at least 6 months and as long as three years before his fall. Dr. Mont opined, without using his notes, that Claimant's fall did not have any effect on aggravating or accelerating the AVN in any way for the following reasons: (1) Claimant continued to work, and patients Dr. Mont treated who had an aggravation of AVN could not walk; (2) witnesses allege that Claimant limped prior to his fall; (3) a lot of the symptoms Claimant was having, including his limp and his quote back pain, might have been due to the AVN; (4) the medical reports do not document that

this was a massive event that changed everything; and (5) Claimant has not undergone bone grafting or resurfacing, nor has he had a hip replacement, so how could the accident have made the situation worse when Claimant hasn't done any steps to take care of the situation. Dr. Mont found Claimant's continued work after the fall to be inconsistent with an aggravation of AVN. He stated that there are other reasons also, like the absence of Claimant complaining of severe hip symptoms. Dr. Mont testified that an aggravation of AVN is an immediate thing. Dr. Mont found that Claimant's failure to complain of groin pain, which is the hallmark symptom of AVN, as further evidence that his fall did not aggravate his AVN. Dr. Mont mentioned that even if Claimant was having groin pain, that Claimant was having similar symptoms before the accident. Dr. Mont mentioned that a person with AVN, who was not interested in saving their hip and had a strong reason to continue working, could continue working through the pain essentially until they die.

During the deposition, Dr. Mont viewed x-rays taken before Claimant's fall, and again concluded that the conditions shown on the films taken after Claimant's fall existed before October 1, 2001. Dr. Mont testified that, if Claimant was interested in saving his hip from collapse, he should be engaged sedentary work and using a cane or a crutch to reduce the amount of force placed on his hip. Dr. Mont assessed the force put on Claimant's hip from the fall as less than the force placed on the hip by one day of walking. He alleged that a lot of Claimant's duties as a welder may have caused more impact to his hip than any fall. Dr. Mont testified that a person can have AVN and be asymptomatic; he mentioned that AVN is often diagnosed by an x-ray taken for a different reason. Dr. Mont testified that his opinion in this matter is based on a 99% degree of medical certainty because he deals with more patients with AVN than anybody in the world. In his 99% degree of medical certainty, he accounts for the possibility that a fall like Claimant had could aggravate AVN, but the chance that such a situation occurred here is less than 1%. Dr. Mont testified that he has only seen aggravation of AVN cases where the person cannot walk that day and are in the ER that night. Dr. Mont allowed that Claimant's fall could have exacerbated his AVN by ½ of 1%, but he questioned whether such a percentage was relevant. He also allowed that there are other pains associated with AVN, but that they are rare, especially in an accident driven problem with the hip. Dr. Mont indicated that his opinion is partly based on a number of witness accounts that Claimant was limping and experiencing hip pain prior to his fall. He also based his opinion on his belief that Claimant's doctors found the same symptoms before the fall as they did after the fall.

Dr. Mont also testified:

> This accident was wonderful for this fellow if he had tried to save his hip. This accident was so wonderful it found a disease that he otherwise would not have been able to have diagnosed because he actually had this quote accident that occurred. So because he found out about, because he had this slip at work or whatever happened. And I saw the whole sit of this thing and there is even a question of what occurred because there is different versions of what actually occurred here, how far he fell. Because of this, he was able to get a diagnosis at a

much earlier time. Because you probably agree with me, this has been going on for a year and a half and he didn't get the diagnosis because everybody was looking at his back and he was limping. If we want to use your arguments, these symptoms that he was having before, if you want to say he's one of those rare cases that doesn't manifest symptoms in the groin like a usual person, well then that is the same argument you can use against your tenant, that the symptoms he has about his avascular necrosis are this limping and this subtle back buttock pain, we can use that argument to corroborate our cause also. I don't agree with it, but I could use it anyway. But the fact is that this accident highlighted the problem that he was having with his hip, and if you were going to try to save his hip with a less invasive procedure than a hip replacement he had an opportunity to do that, we are in 2000. He might still have that opportunity, although I haven't seen, is it correct that I have not seen any x-rays or films or know about his clinical status recently? So I can't make that demonstration. I can't make that statement because I don't know what is going on presently. And I think that would be fair for me if this goes further in this deposition for me to have that type of information. So in fact, the accident did him a favor if he wanted to try to save his hip because it highlighted something. It didn't do him a disservice, it did him a service.

Dr. Mont stated that part of his opinion, that Claimant's fall did not aggravate his AVN, was based on Claimant's failure to seek immediate medical care. He classified that reason as a weak opinion, but one that is further supportive that nothing really changed from the way Claimant existed six months before the accident and the way Claimant is six months or a year after the accident. Dr. Mont then examined an x-ray dated March 5, 1999, and stated that he could see osteonecrotic changes in the same area of Claimant's hip as his current subtle area of collapse.

DISCUSSION

An Administrative Law Judge is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner when determining whether the employee has sustained an injury compensable under the LHWCA. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968), *reh. denied*, 391 U.S. 929 (1969). The claimant bears the ultimate burden of persuasion by a preponderance of the evidence. 5 U.S.C. § 556(d).

Injury Arising Out of the Course of Employment

The initial question to be resolved is whether claimant sustained an injury on October 1, 2001, that now entitles him to benefits under the Act. An "injury" is defined in Section 2(2) of the Act as an "accidental injury ... arising out of or in the course of employment." 33 U.S.C. 902(2). A work-related aggravation of a pre-existing condition is an injury pursuant to Section

2(2) of the LHWCA. *Preziosi v. Controlled Indus.*, 22 BRBS 468 (1989). Where an employment-related injury aggravates, combines with, or accelerates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). An injury need not be traceable to a definite time, but can occur gradually over a period of time. *See Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). A *prima facie* case is established if the claimant sustained physical harm or pain, and an accident occurred in the course of employment or that working conditions existed which could have caused or aggravated that injury. *Kier v. Bethlehem Steel* Corp., 16 BRBS 128 (1984); Kelaita *v. Triple Machine Shop*, 13 BRBS 326, 330-331 (1981) *See also Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). The claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused his harm; rather, the claimant must show that working conditions existed which could have caused his harm. *See generally U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608.

If a *prima facie* case of injury is established, then, under Section 20(a) of the Act, it is presumed that the "injury arose out of and in the course of employment." *Kelaita, supra* at 329-331; *See also Wheatley v. Alder*, 407 F. 2d 307, 312 (D.C. Cir. 1968). The burden then shifts to the employer to produce "substantial evidence to rebut the work-relatedness of the injury." *Volpe v. Northeast Marine Terminals, Inc.*, 671 F. 2d 697, 700 (2nd Cir. 1982), *citing Del Velcchio v. Bowers*, 296 U.S. 280, 285 (1935). The employer's evidence must sever the potential connection between the disability and the work environment. *Hensley v. Washington Metro. Area Transit Auth.*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982), *rev'g* 11 BRBS 468 (1979). In order to rebut the presumption when aggravation of or contribution to a pre-existing condition is alleged, the employer must establish that the claimant's condition was not caused or aggravated by his employment. *Rajotte*, 18 BRBS 85 (1986). If the presumption is rebutted, then it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Id.*

It is undisputed that Claimant fell onto the floor of a barge during the course of his employment. Claimant testified that the fall caused his hip to hurt immediately. Mr. Shute witnessed Claimant's fall and essentially confirms Claimant's account of his fall. Claimant presented to Dr. Wiggins the following morning complaining of right hip pain. Dr. Wiggins detected an area on Claimant's right upper lateral buttocks that was tender to palpation. The evidence shows that Claimant sustained a physical harm which could have been aggravated by a work-related accident. Claimant has established a *prima facie* case of injury, and is entitled to the presumption that his injury arose out of and in the course of his employment under Section 20(a) of the Act. The burden now shifts to Employer to produce substantial evidence to rebut the presumption that Claimant's injury arose of and in the course of his employment.

Employer adduced the medical testimony of Dr. Mont. He opined that Claimant suffers from a hip condition, AVN, which pre-existed his fall on October 1, 2001, by six months to three years. Dr. Mont stated with 99% plus certainty that Claimant's fall did not aggravate his AVN.

He commented that the natural progression of Claimant's AVN would necessitate a total hip replacement. Dr. Mont's testimony severs the potential connection between Claimant's disability and his work environment. Employer has presented substantial evidence that rebuts the work-relatedness of Claimant's injury. Therefore, Claimant may not rely upon the presumption contained in Section 20(a), and must prove that his injury arose out of and in the course of his employment by a preponderance of the evidence.

Drs. Mont and Jackson concur that Claimant suffers from AVN in his right hip, a condition that pre-existed his fall on October 1, 2001. Therefore, Claimant must show that his employment-related injury on October 1, 2001, combined with, contributed to, or accelerated his pre-existing AVN.

Dr. Jackson opined that Claimant's pre-existing AVN was aggravated by the trauma Claimant sustained in his fall on October 1, 2001. He testified that his diagnosis was based on Claimant's complaints of acute onset of pain in his right hip after the fall on October 1, 2001. He relied on Claimant's subjective reports of pain as the only way to determine whether Claimant's AVN was aggravated by the fall. Dr. Jackson noted that a person with AVN may be asymptomatic, then suffer a microscopic fracture in a weak bone that aggravates the AVN. He also opined that a stoic person could climb a ladder after aggravating their AVN, while others would have to be taken out on a stretcher. Dr. Jackson concluded that, even if Claimant did have prior episodes of hip pain, Claimant still suffered an aggravation of his AVN after falling because his condition worsened. He did allow for the possibility that Claimant's hip would have collapsed even if he did not fall on October 1, 2001. Dr. Jackson employs a broader definition of aggravation than Dr. Mont, but the Act does not set parameters for the diagnosis of aggravation. Dr. Jackson examined Claimant on at least three occasions. He submitted Claimant to objective testing, including x-rays and MRIs. Dr. Jackson provided clinical observations and findings, and his conclusions are supported by adequate data. Dr. Jackson's opinion is well-reasoned and well-documented. I find that Dr. Jackson's opinion is entitled to probative weight enhanced by his credentials as a board-certified orthopaedic surgeon with considerable experience in treating AVN.

Dr. Mont, in his narrative report, opined that it was unlikely that Claimant's fall aggravated or accelerated his pre-existing hip condition. Dr. Mont also opined that Claimant would have required the same treatment even if he had not fallen on October 1, 2001. A few days later, at his deposition, Dr. Mont's opinion had grown stronger. He testified that Claimant's fall did not have any effect on aggravating or accelerating the AVN. He initially provided five reasons to support this stronger opinion, which he was careful to point out were not in order of importance. He continued to bolster his opinion throughout his testimony with supportive facts. Dr. Mont testified that all of his opinions in this matter are to a 99% degree of medical certainty, because he deals with more cases of AVN than anybody else in the world. He allowed that Claimant's fall could have aggravated his AVN by ½ of 1%, but didn't believe such a degree was relevant. Lastly, Dr. Mont noted that AVN is often not detected for a long period of time. He added that Claimant's fall was wonderful because it allowed for an earlier diagnosis of his AVN.

Dr. Mont stated that Claimant's AVN had not been diagnosed for the past year-and-a-half because Claimant's physicians were looking at his back and his limp. Dr. Mont's opinions were based on his review of Claimant's medical records.

Dr. Mont's credentials as a board-certified orthopaedic surgeon and his expertise in the area of osteonecrotic disease would entitle his opinion to strong probative weight. However, I find that Dr. Mont's opinion is not entitled to probative weight because it is not well-reasoned.[4] The evidence of the record does not support Dr. Mont's opinion. His supportive reasoning relies upon facts that are not in the record, he misconstrues facts, and ignores evidence contrary to his opinion. Also, he relies upon a constrained definition of aggravation. Dr. Mont questions the accuracy of Claimant's complaints of back pain, construing such complaints as a symptom which should have led his physicians to diagnose AVN. Drs. Lundberg and Crawford both interpreted x-rays to show that Claimant had a degenerative disc disease in his lumbar spine. Dr. Mont did not rule out the degenerative disc disease as the source of Claimant's back pain. He simply assumed that the back pain was indicative of AVN without ever addressing the diagnosis of degenerative disc disease.

Dr. Mont relied on statements that Claimant limped before his fall, which he intimated was caused by his pre-existing AVN. He also testified that Claimant did not complain of groin pain after the fall, which is the hallmark pain of AVN. Dr. Mont then said that, even if Claimant did have groin pain, he had similar symptoms before the fall. He never identiified what leg Claimant limped with. Mr. Goode's testimony and Dr. Lundberg's MRI report dated October 5, 2001, provide the only evidence that Claimant limped due to hip pain prior to October 1, 2001. Dr. Wiggins noted that Claimant complained of pain in his posterior right hip that extends down into his leg. Dr. Jackson noted right hip and groin pain as described by Claimant, upon his first examination of Claimant. Dr. Jackson continued to document Claimant's considerable hip pain. The medical records from the St. Nicholas Free Clinic and the V.A. Clinic do not contain any complaint by Claimant of hip pain, nor do any of the examining physicians note a problem with Claimant's gait, prior to Claimant's fall. Claimant denied ever experiencing hip pain prior to the fall, and testified that his limp was due to soreness and arthritis in his ankles, knees, or back. He testified that he did not tell anyone from Dr. Lundberg's office that he had previously experienced hip pain. Mr. Curnel testified that Claimant told him that he limped because his back or leg was hurting. Mr. Shute, Mr. Mallot and Mr. Curnel never heard Claimant complain about his hip. No witness was able to recall or identify which leg Claimant limped with. Claimant's job involved arduous labor. Mr. Goode, Mr. Mallot, Mr. Shute, and Mr. Curnel all testified that Claimant's physical condition never prevented him from performing any job task. Dr. Mont's use of Claimant's limp due to hip pain prior to his fall is presumptuous and detracts from the reliability of his opinion.

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[4]The videotape of Dr. Mont's deposition raises questions regarding his credibility. His overall demeanor was unimpressive; he often appeared distracted or indifferent. He testified without the benefit of his notes because he could not locate them. He intently studied Claimant's x-rays for the duration of Claimant's counsel's cross-examination. He displayed a cavalier, off-the-cuff approach.

Dr. Mont also relied upon the fact that Claimant continued to work after his fall to support his opinion that Claimant did not aggravate his AVN. He initially testified that an aggravation of AVN, in his experience, would require immediate medical attention. Later, Dr. Mont testified that a person with a strong reason to work, who was not interested in saving their hip from total replacement, could essentially work through the pain until they die. Dr. Jackson stated that he was not surprised by Claimant's continued work after the fall because it was a matter of pain tolerance. Claimant testified that he only had a few hours left on his shift, so he just finished it out. He sought medical attention the following morning and never returned to work. Again, Dr. Mont relied upon facts that are not supported by the record to support his opinion.

Employer argues that the determination of whether Claimant's fall aggravated his pre-existing AVN will partially turn on Claimant's credibility because Dr. Jackson admittedly relied on Claimant's subjective report of acute onset of hip pain as the basis for forming his opinion that Claimant's fall aggravated his AVN. Employer attempted to show that Claimant was not credible through the testimony of Dr. Mont, Mr. Goode, Mr. Curnel, Dr. Lundberg's MRI report of October 5,2001, and by the testimony of Nurse Elam.

Nurse Elam's testimony is not credible.[5] She has no independent recollection of her conversation with Claimant. She transcribed her notes 19 days after her phone conversation with Claimant. Nurse Elam testified that she did not make the notations on the front of the phone message, however, she included them in the transcription of her phone conversation with Claimant on October 1, 2001. She testified that her only phone conversation with Claimant occurred at 10:00 AM on October 1, 2001, which is contradicted by a wealth of evidence. Her testimony does not diminish Claimant's credibility.

Mr. Curnel's testimony that Claimant limped is credible. Mr. Goode's testimony that Claimant was experiencing hip pain prior to his fall is credible. However, his testimony is the only evidence that Claimant experienced hip pain prior to October 1, 2001. Claimant specifically denied ever telling Mr. Goode that his hip hurt. Mr. Curnel, Mr. Mallot, and Mr. Shute never heard Claimant complain about his hip. There are no reports of hip pain in any of Claimant's medical records prior to October 1, 2001. Claimant was obviously less than truthful when he completed the pre-employment medical questionnaires, and his lack of candor cannot be justified by his desire to obtain employment. However, his conduct was not so egregious as to taint his capacity for truth and veracity with regard to this matter.[6] Claimant appeared to make a genuine

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[5]I find that Claimant's testimony to be credible regarding the phone message of September 27, 2001. The evidence supports his version of events and contradicts Nurse Elam's transcription. Nurse Elam testified that she only had one conversation with Claimant. Claimant obviously called on September 27, 2001, and left a phone message for Nurse Elam. Nurse Elam returned his call on September 28, 2001, but the call was not answered. Claimant's phone records show that a call was placed from his residence to the V.A. Clinic at 3:24 PM, which corresponds with Claimant's testimony regarding his activities after leaving work on October 1, 2001.

[6]An employee's misrepresentation of his medical history on initial employment application did not bar employee from receiving compensation for employment-related injury, even though employer relied on such

effort to provide accurate testimony. Most of Claimant's testimony is confirmed by independent sources in the record. I find that Claimant's testimony is credible. Mr. Goode's statement and Dr. Lundberg's MRI report, in the face of contradictory evidence, are not sufficient to cast doubt upon Claimant's testimony that he did not suffer from hip pain prior to October 1, 2001.

I have found Claimant's testimony to be credible. Dr. Jackson, in reliance upon Claimant's report of acute onset of pain immediately after the fall, opined that Claimant's pre-existing AVN was aggravated by the fall. Although Dr. Mont possesses equal, if not superior qualifications, his opinion does not carry weight equal to Dr. Jackson's opinion. The preponderance of the evidence establishes that Claimant's fall on October 1, 2001, resulted in an aggravation to a pre-existing disease. I find that Claimant has established an injury arising out of and in the course of his employment.

Nature, Extent, and Duration of Disability

Claimant has received no compensation to date, and seeks temporary total disability benefits from October 1, 2001, to date and continuing. The same standard applies for permanent or temporary total disability. *Walker v. Sun Shipbuilding & Dry Dock Co. (Walker II)*, 19. BRBS 171 (1986). In case of disability total in character but temporary in quality, $66^{2/3}$ per centum of the average weekly wages shall be paid to the employee during the continuance thereof. § 908(b). The LHWCA defines "disability" as incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment. § 902(10). Therefore, in order for a claimant to receive a disability award, the evidence must establish an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). To establish a *prima facie* case of temporary total disability, the Claimant must show that he cannot return to his regular or usual employment due to his work-related injury. The determination is made by a comparison of claimant's medical restrictions with the specific requirements of his usual employment. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). A physician's opinion that the claimant's return to his usual or similar work would aggravate his condition is sufficient to support a finding of total disability. *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988). If the claimant makes a *prima facie* showing, the burden shifts to the employer to show suitable alternative employment. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

misrepresentation, and even though subsequent injury was causally related to concealed prior history. *See Newport News Shipbuilding & Dry Dock Co. v. Hall*, 674 F.2d 248 (4th Cir. 1982).

Claimant's usual employment at the time of the injury was that of a welder. This was a physical job, which required lifting and carrying, crawling, and climbing. Claimant has not held gainful employment since the injury. Dr. Jackson opined that Claimant's hip will only worsen, and that he will be unable to return to work until he receives a total hip arthroplasty. He noted that Claimant's AVN caused severe pain, and that his hip was on the verge of total collapse. Dr. Mont recommended that Claimant undergo a bone grafting procedure or a limited resurfacing arthroplasty, but stated that it would not be wrong to consider a hip replacement. Dr. Mont also stated that, if Claimant were interested in saving his hip, he should have engaged in only sedentary work and used a crutch to reduce the amount of force put on Claimant's hip. He also mentioned that Claimant's job tasks would irritate his AVN.

I find that Claimant has been unable to engage in his usual employment as a welder since October 1, 2001, and he will continue to be unable to engage in his usual employment until such time as he undergoes a total right hip arthroplasty. Therefore, Claimant has established a *prima facie* case for temporary total disability. Employer has not provided any evidence of suitable alternative employment. Thus, I find that Claimant is temporarily totally disabled.

Entitlement to Medical Benefits

Employers are required to furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or process of recovery may require. § 907(a). Claimant bears the burden of establishing the necessity of the treatment rendered for the work-related injury. *See generally Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996). Claimant must establish that the expenses are reasonable and necessary, and the medical care must be appropriate for the injury. *Pernell v. Capital Hill Masonry*, 11 BRBS 532, 539 (1979); *Ballesteros v. Williamette Western Corp.*, 20 BRBS 184, 187 (1988). The claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates that the treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-8 (1984).

Dr. Jackson recommends that Claimant undergo a total right hip arthroplasty to correct the damage caused by Claimant's AVN, which was aggravated by a work-related injury. Dr. Mont opined that it would not be wrong to consider a total hip replacement. Both physicians concluded that, without corrective intervention, Claimant's hip will collapse and result in very disabling hip arthritis. A total right hip arthroplasty is reasonable and necessary, and it is appropriate medical care. Dr. Jackson is authorized to perform a total right hip arthroplasty. Employer shall reimburse Claimant for the expense of a total right hip arthroplasty performed by Dr. Jackson.

Medical Expenses Reimbursement

Section 907(d)(1) provides that a claimant who has paid his own medical expenses can be reimbursed by the employer if the employer refused or neglected to provide treatment and the employee has complied with subsections (b) and (c), or the nature of the injury required the treatment and services and, although the employer knew of the injury, they neglected to provide or authorize payment. §§ 907(d)(1)(A) & (B). An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996). Once the employer has refused to provide treatment or to satisfy a claimant's request for treatment, the claimant is released from the obligation of continuing to seek employer's approval. *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988). The claimant then only needs to establish that the treatment subsequently procured was necessary for treatment of the injury, in order to be entitled to such treatment at the employer's expense. *Rieche v. Tracor Marine*, 16 BRBS 272, 275 (1984).

Claimant seeks payment of medical bills in the amount of $2,015.83 for treatment. The medical bills are for treatment rendered by Dr. Wiggins, Crawford Lundberg X-ray, Lourdes Hospital, and Dr. Jackson. The records indicate that all treatment was provided after October 1, 2001, for Claimant's right hip. I find that the medical expenses of $2,015.83 were necessary for treatment of Claimant's work related injury. Employer shall reimburse Claimant $2,015.83 for medical expenses incurred in the course of treating his work-related injury.

Attorney Fees

Section 928(a) provides for the payment of attorney's fees by the employer if the employer declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation. § 928(a). Thereafter, if the claimant utilizes the services of an attorney in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer in an amount approved by the court. § 928(c). Claimant is seeking $27, 002.50 in attorney fees and $3,019.94 in litigation expenses. The fees and expenses were set forth in an itemized fee and cost petition filed on June 7, 2002. Employer has not filed a response to this application, nor has Employer indicated any objection to the fee and cost amount. Counsel for Claimant has successfully prosecuted Claimant's application for benefits under the Act. I find that, after considering the background and experience of Claimant's counsel as well as the complexity of this matter, that the requested attorney's fees are reasonable. Therefore, OALJ fees in the amount of $24,377.50 for the services of Mr. Schletker and $2,625.00 for the services of Mr. Edwards are approved. I also approve OALJ expenses in the amount of $3,019.94. The grand total of approved OALJ fees and expenses is $30,022.44.

Entitlement

The evidence in the record supports the conclusion that James Henning has been permanently and totally disabled since November 28, 2001. I find that the Claimant's average weekly wage at the time of injury was $578.80. I further find the Claimant is entitled to reimbursement for past medical expenses incurred for treatment of his injury.

ORDER

Based on the Findings of Fact and Conclusions of Law expressed herein, as well as the record as a whole, I issue the following compensation order. The specific dollar computations of compensation shall be administratively performed by the District Director. It is THEREFORE ORDERED that:

1. Employer, James Marine, shall pay Claimant, James Henning, compensation for temporary total disability, in an amount to be determined by the district director, commencing on October 1, 2001, and continuing through the present and for the duration of Claimant's temporary total disability, based on Claimant's average weekly wage in accordance with the provisions of Section 8(a) and the annual adjustments of Section 10 of the Act.

2. Employer shall reimburse such reasonable, appropriate, and necessary medical care and treatment expenses in the amount of $2,015.83 as requested by Claimant, and any other such benefits as the Claimant's work-related injury may require, subject to the provisions of Section 7 of the Act.

3. Employer shall reimburse Claimant for the expense of a total right hip arthroplasty to be performed by Dr. Jackson, subject to the provisions of Section 7 of the Act.

4. Employer shall pay Claimant's attorney fees and costs in the amount of $30,022.44.

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THOMAS F. PHALEN
Administrative Law Judge